IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 488

MRS. DORIS DANIEL and MRS. ROSALYN KYLES,

Petitioners,

v.

EUELL PAUL, JR., Individually and as Owner, Operator or Manager of Lake Nixon Club,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF AMICUS CURIAE

JAMES W. GALLMAN
BALL & GALLMAN
P. O. Box 567
Fayetteville, Arkansas 72701

INDEX

SUBJECT INDEX

TABLE OF AUTHORITIES

CASES:

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 488

MRS. DORIS DANIEL and MRS. ROSALYN KYLES,

Petitioners,

v.

EUELL PAUL, JR., Individually and as Owner, Operator or Manager of Lake Nixon Club,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF AMICUS CURIAE

Statement

Petitioners' statement of the case is accepted but for the point that there is no evidence in the record showing that *Little Rock Today,* a magazine in which respondent advertised, is directed to tourists or newcomers.

Summary of Argument

Lake Nixon is a place of recreation operated for a profit. The fact that it is open to the white public in general is not sufficient to support a holding that it offers to serve interstate travelers. Its advertising is restricted to the local area. There is no evidence that it serves interstate travelers. There is no showing that a substantial portion of the food served by the snack bar at Lake Nixon moved in interstate commerce. Congress did not intend that Title II apply to an eating facility which is purely incidental to the operations of a business.

Lake Nixon presents no performances, productions, or exhibitions which move in interstate commerce. It is not a place of entertainment within the meaning of Title II even if this Court should give the broadest interpretation of that phrase. The recreation equipment of Lake Nixon are not sources of entertainment which move in commerce.

Section 1982 is not properly before the Court. Further, a ticket is a mere license which confers no property right upon its holder, and respondent's refusal to sell tickets to petitioners did not violate §1982. Section 1891 extended to all persons within the jurisdiction of the United States the capacity to contract. It does not require one person to enter into a contract with another. Therefore, respondent's refusal to sell petitioners tickets did not contravene §1891.

ARGUMENT

I.

Lake Nixon Club Is Not a Place of Public Accommodation Within the Coverage of Title II of the 1964 Civil Rights Act.

When President Kennedy proposed the 1964 Civil Rights Act, he did not intend that every business enterprise be included within the coverage of Title II which prohibits discrimination in places of public accommodation.[1] Nor did the final enactment extend the coverage so far. Senator Humphrey stated that the Act was of a moderate nature and did not cover all retail establishments. 110 Cong. Reg. 6533 (1964). The choice of which businesses are covered is within the exclusive power of Congress acting within Constitutional limitations. *Heart of Atlanta Motel* v. *U. S.*, 379 U.S. 241, 273 *(concurring opinion)* (1964). And, this Court held that Congress intended for Title II to apply only to those establishments having a "direct and substantial" relation to interstate commerce, where no state action is involved. *Heart of Atlanta Motel* v. *U. S.*, 379 U.S. 241, 250 (1964). Congress placed certain guidelines within Title II to enable the courts to make the proper determinations of which establishments have an effect upon interstate commerce within the meaning of the Act. Ap-

[1] Attorney General Robert F. Kennedy stated, "One can argue legitimately [from the moral principle involved] to the inclusion of all forms of business enterprises within the reach of the Constitution. The administration proposal did not attempt to extend Federal law so far." *Hearings on H.R. 7152 Before the House Committee on the Judiciary*, 88th Cong., 1st Sess., pt. 4, at 2655 (1963).

plication of these guidelines to the facts here involved indicates that Congress did not intend for the establishments such as Lake Nixon to come within the coverage of Title II of the 1964 Civil Rights Act.

A. *The Snack Bar Operations Do Not Bring Lake Nixon Within the Coverage of Title II of the 1964 Civil Rights Act.*

In order for Title II to apply to the snack bar operations it must either serve a substantial amount of food that has moved in commerce or serve or offer to serve interstate travelers. 42 U.S.C. §2000a(b)(2) and (c)(2).

Petitioners first contend that the snack bar at Lake Nixon offers to serve interstate travelers by the mere fact that it is open to the white public in general and state that what is important is that Lake Nixon does not *prohibit* interstate travelers from using its facilities. If by merely being open to the public in general an establishment is held to offer to serve interstate travelers, then the clear intention of Congress that not all retail establishments are covered would be abrogated. Further, the drafters did not contemplate that a failure to prohibit interstate travelers would bring an establishment within the coverage of Title II. The stipulated fact that a proprietor does not inquire as to whether customers are interstate travelers is not sufficient to determine that he offers to serve interstate travelers. *Codogan* v. *Fox*, 266 F. Supp. 866, 867 (M.D. Fla. 1967). The qualification that a certain type of establishment serves or offers to serve interstate travelers in order for Title II to apply was the method selected

by Congress to limit its coverage.[2] To uphold petitioners' contention would be to expunge the limitation.

The Act requires the complaining party to show that there is in fact service or an offer of service to interstate travelers. Petitioners offered no evidence that any interstate traveler had frequented Lake Nixon. The facts show that Lake Nixon was removed from the arteries of interstate travel. Its advertisements were restricted to the local area. Radio advertisements were addressed to members of the "club" (A. 43). Petitioners state that respondent placed an advertisement in a "tourist" magazine. The only evidence in the record on this point is that respondent placed one advertisement in one issue of a magazine entitled "Little Rock Today" (A. 12). There is no evidence in the record that this magazine is directed to tourists.

The cases upon which petitioners rely, which cases held that a restaurant or drive-in served or offered to serve interstate travelers, are founded upon facts not present here. In *Gregory* v. *Meyer*, 376 F. 2d 509 (5th Cir. 1967) the drive-in was located only three blocks from a federal highway. In *Evans* v. *Laurel Links, Inc.*, 261 F. Supp. 474, 476 (E.D. Va. 1966) it was not disputed that the golf course and its snack bar served interstate travelers who came there annually to participate in golf tournaments. In *Willis* v. *Pickrick Restaurant*, 231 F. Supp. 396 (N.D.

---

[2] In answer to the question of why there were different tests provided for hotels than for other establishments, Attorney General Kennedy stated, "I think hotels and motels are quite clearly more involved in dealing with individuals traveling from one part of the country to another. . . . That's why we put in those qualifications." *Hearings on Miscellaneous Proposals Regarding Civil Rights Before Subcommittee No. 5 of the House Committee on the Judiciary*, 88th Cong., 1st Sess., pt. 2, at 1400 (1963).

Ga. 1964) the restaurant was located on an interstate highway and advertised by means of billboards located along side interstate federal highways. None of the foregoing facts are present in this case, and the scant evidence presented by petitioners fails to establish that Lake Nixon served or offered to serve interstate travelers. The district court found that Lake Nixon did not attempt to attract interstate travelers, and that it was unlikely that an interstate traveler would break his trip to visit Lake Nixon. 395 F. 2d 412, 418 (A. 56-57). This finding is not clearly erroneous and is entitled to be upheld.

Petitioners next contend that Lake Nixon is subject to 42 U.S.C. §2000a(b)(2) and (c)(2) because a substantial portion of the food sold at the snack bar has moved in commerce. We agree with petitioners that "substantial" means more than minimal. *Gregory* v. *Meyer*, 376 F. 2d 509, 511 (5th Cir. 1967). It must be pointed out, however, that every case upon which petitioners rely, holding that a substantial portion of the food served had moved in commerce, contained either clear evidence or stipulations that a certain percentage of the food sold had in fact moved in commerce.[3] The only facts brought forth by petitioners in this case are that the snack bar serves hamburgers, hot dogs, soft drinks and milk and that the gross receipts from the food sales constitute almost 23% of the total gross

[3] *Gregory* v. *Meyer*, 376 F. 2d 509, 511 (5th Cir. 1967), $5000.00 of the sales were of coffee and tea which had moved in commerce and two thirds of the sales were of beef which had moved in commerce; *Katzenbach* v. *McClung*, 379 U.S. 294, 296 (1964), the evidence clearly showed that 46% of the sales were of meat which had moved in commerce; *Codogan* v. *Fox*, 266 F. Supp. 866, 867 (M.D. Fla. 1967), the parties stipulated that from 23% to 30% moved in commerce; and *Fazzio Real Estate Co.* v. *Adams*, 396 F. 2d 146, 148 n. 2 (5th Cir. 1968), it was not disputed that a substantial portion of the food served had moved in commerce.

receipts. The evidence of the gross receipts of a lunch counter operation does not furnish a basis for determining how much food moved in commerce. *Evans* v. *Laurel Links, Inc.*, 261 F. Supp. 474, 476 (E.D. Va. 1966). Petitioners couple the fact that four main items are sold with the observation of the district court that some of the ingredients in the bread come from out of state and reach the conclusion that 75% of the food sold contains out-of-state ingredients. Petitioners did not show how many nor in what amounts ingredients from outside Arkansas are used. Petitioners did not attempt to show the cost of out-of-state ingredients as compared to the total cost of the food items. Petitioners did not present evidence showing the origin of the meat used at the food counter. The Eighth Circuit took judicial notice that the milk was obtained in Arkansas. 375 F. 2d 118, 124. The burden was on petitioners to show that a substantial portion of the food served moved in commerce. The facts, or lack of evidence, clearly indicate that this burden was not met.

For the foregoing reasons, respondents assert that the snack bar operations were not covered by 42 U.S.C. §2000a (b)(2) and (c)(2), and that Lake Nixon does not come within the coverage of Title II because a covered establishment is located on the premises under 42 U.S.C. §2000a (b)(4) and (c)(4).

Respondents cannot agree with petitioners that the Eighth Circuit apparently requires two establishments under separate management for coverage under 42 U.S.C. §2000a(b)(4). At 395 F. 2d 118, 123, cited by petitioner, the Eighth Circuit discusses the district court's holding that the sale of food was a mere adjunct to the principal operations at Lake Nixon. However, the Court then con-

siders the facts presented by petitioners and concludes by holding that petitioners cannot recover because of a "complete absence of evidence" showing an effect upon commerce within the meaning of the Act. 395 F. 2d 118, 127 (A. 82).

Even though it is not necessary to the Eighth Circuit's decision, there is considerable merit to the district court's conclusion that Title II does not apply to the operations of the snack bar because its operation is purely incidental to the principal business of Lake Nixon. It is said in *Newman* v. *Piggie Park Enterprises*, 377 F. 2d 433, 435, *mod. and aff'd on other gds.*, 390 U.S. 400 (1968):

> The term "principally" did not appear in the bill as introduced. . . . Its inclusion . . . was intended to exclude from coverage places where food service was incidental to some other business.

The bill as introduced contained an "integral part" test to determine whether an establishment was covered because of its relationship to a covered establishment. It provided that an establishment was covered if " . . . such place or establishment is an integral part of . . . " an establishment otherwise covered.[4] Although this language was not adopted, it shows that the Act's sponsors did not intend that Title II cover an establishment because it incidentally served food. This same intent applies to the bill as enacted. Senator Magnuson, who was principal floor spokesman for the bill in the Senate, stated:

---

[4] *Hearings on Miscellaneous Proposals Regarding Civil Rights Before Subcommittee No. 5 of the House Committee on the Judiciary*, 88th Cong., 1st Sess., pt. 2, at 1404 (1963).

> . . . a bar in the strict sense of the word would not be covered by Title II since it is not *'principally'* engaged in selling food for consumption on the premises. 110 Cong. Reg. 7406 (1964). (Emphasis added.)

Cases involving lunch counters in retail concerns are distinguishable on the grounds that the Act specifically applies to such facilities and the establishments involved unquestionably had a direct and substantial relation to interstate commerce. *Hamm* v. *Rock Hill,* 379 U.S. 306 (1964).

Fazzio Real Estate Co. v. *Adams,* 396 F. 2d 146 (5th Cir. 1968) upon which petitioner relies is likewise distinguishable from the present case. Although that court said in dictum that there was no distinction with regard to the principal purpose of a business, it found that the refreshment counter there involved was not an "insignificant adjunct" to the bowling alley operations. In the present case the district court found that the snack bar operations were "purely incidental" to the operation of Lake Nixon. 263 F. Supp. 412, 417 (A. 53). This finding is supported by the evidence. Although the sale of food comprised almost 23% of the gross receipts (A. 13, 63), the net income produced by the snack counter was only $1,412.62 (A. 63) which was only 7% (A. 13) of the total net income. Viewing these facts in light of the Congressional intent to "exclude from coverage places where food service was incidental to some other business," lends clear support to the district court's decision.

B. *Lake Nixon Is Not a Place of Entertainment Which Customarily Presents Sources of Entertainment Which Move in Commerce Within the Meaning of Title II of the 1964 Civil Rights Act.*

A place of entertainment is within the coverage of Title II only if it affects commerce. 42 U.S.C. §2000a(b)(3). Two elements must be found to exist before the Act applies. First, the establishment must be a place of entertainment. Second, it must customarily present sources of entertainment which move in commerce.

The district court's application of the rule of *ejusdem generis* reaches the proper definition of the terms "place of entertainment" as intended by Congress. In the *Hearings on Miscellaneous Proposals Regarding Civil Rights Before Subcomm. No. 5 of the House Comm. on the Judiciary,* 88th Cong., 1st Sess., pt. 4, at 1402-1403 (1963) Attorney General Kennedy was asked to submit a list of establishments prohibited from discrimination under Title II of the 1964 Civil Rights Act. The document he presented, under the section dealing with places of entertainment, spoke of establishments which present *performances, productions* and *exhibitions.* His use of those terms clearly indicates that the district court was correct in its decision that a "place of entertainment" within the meaning of the Act is an establishment where the patrons are spectators.[8]

Petitioners contend that Lake Nixon is covered by Title II even though a "place of entertainment" is construed to

[8] See, e.g., *Robertson v. Johnston,* 249 F. Supp. 618, 622 (E.D. La. 1966), where the court said, "Thus, 'place of entertainment' is not to be construed to mean 'place of enjoyment', but rather must be limited at least to 'place where performances are presented'."

mean an establishment which presents spectator activities. This contention fails to give proper consideration to the language of 42 U.S.C. §2000a(c)(3). That section requires that the establishment customarily *present* the entertainment. Conceding the questionable proposition that picnicking, sun-bathing, boating, dancing and swimming are "spectator activities", Lake Nixon does not *present* the people who perform these activities in order to attract customers from whom a fee is collected for viewing. The undisputed testimony is that patrons of Lake Nixon were charged only for what they *did*. They did not pay any fee to watch others perform (A. 27). Thus, Lake Nixon is not a place of entertainment within the meaning attached to those terms by Congress.

Petitioners contend that a broad interpretation should be given to the language "place of entertainment" in order to give effect to the overriding purpose of Title II to eliminate discrimination in facilities which were the focal point of civil rights demonstrations. There is no evidence that Lake Nixon should be considered such a focal point. In fact, the evidence presented leads to the conclusion that it is not a place as would be conducive of demonstrations. Petitioners were the only Negroes who ever attempted to use the facilities (A. 42). Lake Nixon is located in a placid country surrounding. It is not situated so that a demonstration would bring the desired effect of creating publicity tending to call the attention of the public to the discrimination. Thus, even under the broadest of interpretations, Lake Nixon is not a place of entertainment within the meaning of Title II of the 1964 Civil Rights Act.

Even should Lake Nixon be a "place of entertainment", it is not within the coverage of Title II because it does not

customarily present sources of entertainment which move in interstate commerce. As evidenced by Attorney General Kennedy's statement,[6] the drafters of Title II contemplated that an establishment present films, performers, lecturers, exhibitors and the like if it was to be covered by 42 U.S.C. §2000a(c)(3). The only performances presented were a diving exhibition and certain performances of dance bands. The evidence shows that neither of these sources of entertainment moved in commerce (A. 33), and the district court so held. 263 F. Supp. 412, 417 (A. 61). The only other evidence upon this point is that there are situated on the premises of Lake Nixon two juke boxes manufactured outside Arkansas which play records some of which come from out-of-state and that one yak was purchased and certain other boats were leased from an Oklahoma company. There is no evidence showing where the boats were manufactured or that they ever moved in interstate commerce. Upon these facts, the Eighth Circuit's conclusion that there is a total lack of evidence that the sources of entertainment move in interstate commerce must be affirmed.

Petitioners finally contend that Congress intended the bill to reach businesses which individually had a minimal or insignificant impact on interstate commerce. Suffice it to say that this Court held in *Heart of Atlanta Motel* v. *U. S.*, 379 U.S. 241, 250 (1964) that Title II of the 1964 Civil Rights Act applies only to those businesses having a direct and substantial relation to interstate commerce.

---

[6] *Hearings on Miscellaneous Proposals Regarding Civil Rights Before Subcommittee No. 5 of the House Committee on the Judiciary*, 88th Cong., 1st Sess., pt. 4, at 1402-1403 (1963).

II.

Lake Nixon's Refusal to Admit Petitioners Did Not Deny Them Any Rights Guaranteed by 42 U.S.C. §§1981 and 1982.

42 U.S.C. §1982 is not properly before the Court because it was not pleaded below. Petitioners assert that failure to plead a question in the lower courts does not preclude reliance upon it on appeal. This Court has, indeed, held that the mere failure to raise a constitutional question prior to a decision which supports it does not prevent a litigant from later invoking such a ground. *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 143 (1967). However, even constitutional objections may be waived by a failure to raise them at a proper time so long as the waiver is of a known right or privilege. *Ibid.* That petitioners knew of the rights secured by §1982 cannot be doubted, for in their complaint they relied upon §1981 and §1983 of the same title. The other case upon which petitioners rely, *Thrope* v. *Housing Authority*, 37 U.S.L.W. 4068, 4072 (U.S. Jan. 13, 1969), held that as a general rule the appellate court must apply the law in effect at the time it renders its decision. Therefore, the court was bound to follow a federal regulation even though it had not been issued at the time the suit was commenced. The basis of the decision was that the appellate court was bound to follow the new law where it has been *changed* since the lower court's decision.[7] In the present case there was no change in the law. Section 1982 was enacted in 1866. It was available for petitioners'

[7] "A change in the law between nisi prius and an appellate decision requires the appellate court to apply the changed law." *Thrope* v. *Housing Authority*, 37 U.S.L.W. 4068, 4072 n. 38 (U.S. Jan. 13, 1969).

use at the time the complaint was filed. Petitioners simply did not rely upon §1982 as grounds for relief, and that failure should preclude them from urging it as grounds for reversal.

Even should petitioners be permitted to rely upon §1982 in this Court, it does not forbid the action taken by respondents in this case. The holding in *Jones* v. *Mayer Co.*, 392 U.S. 409, 413 (1968) is that §1982 bars all racial discrimination in the sale or rental of *property*. It is well settled that a ticket to enter a certain establishment does not create any property right. *Marrone* v. *Washington Jockey Club*, 227 U.S. 633, 636 (1912). A ticket is only a license to enter. *McCrea* v. *Marsh*, 12 Gray (78 Mass.) 211, 71 Am. Dec. 745 (1858). A license passes no property interest. Thomson, *Real Property*, §1032, p. 106 (1959 Repl.); *Wynn* v. *Garland*, 19 Ark. 23, 68 Am. Dec. 190 (1857); *Schuman* v. *Stevenson*, 215 Ark. 102, 219 S.W. 2d 429 (1949). Therefore, refusal to sell petitioners a ticket to Lake Nixon did not violate rights guaranteed by §1982.

Finally, petitioners contend that by refusing to sell them tickets to Lake Nixon respondents violated rights guaranteed by §1981. Section 1981 provides *inter alia* that all persons within the jurisdiction of the United States shall have the same right to make and enforce contracts as is enjoyed by white citizens. The purpose of the 1866 Civil Rights Act, of which §1981 was a part, was to abolish the incidents of slavery. *Jones* v. *Mayer Co.*, 392 U.S. 409, 440 (1968). One such incident of slavery was that Negroes had no capacity to contract. *Jones* v. *Mayer Co.*, 392 U.S. 409, 444 (*concurring opinion*) (1968). Therefore, a reasonable interpretation of §1981 is that it extended to

Negroes the same *capacity* to contract as is enjoyed by white citizens. This interpretation is further supported by the other language in the section. It grants all persons within the jurisdiction of the United States the same right "... to sue, be parties, [and] give evidence. ..." as is enjoyed by white citizens. Prior to the Thirteenth Amendment the Negro did not have the legal capacity to perform these acts.

However, by extending to Negroes the same capacity to contract as is enjoyed by white citizens, Congress surely did not intend that one person be allowed to force another to enter into a contract. White citizens have no right to compel other persons to enter into agreements with them. Section 1891 does not prohibit respondent's refusal to contract with petitioners, whatever may be the reason for that refusal. To hold otherwise would extend the scope of §1981 far beyond that intended by the Congress which enacted it.

Conclusion

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

James W. Gallman
Ball & Gallman
Attorneys at Law
P. O. Box 567
Fayetteville, Arkansas 72701

hall, sports arena, stadium or other place of exhibition or entertainment; and

"(4) any establishment (A) . . . (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment."

Section 201 (c) sets forth standards for determining whether the operations of an establishment in any of these categories affect commerce within the meaning of Title II:

"The operations of an establishment affect commerce within the meaning of this subchapter if . . . (2) in the case of an establishment described in paragraph (2) [set out *supra*] . . . , it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce; (3) in the case of an establishment described in paragraph (3) [set out *supra*] . . . , it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; and (4) in the case of an establishment described in paragraph (4) [set out *supra*] . . . , there is physically located within its premises, an establishment the operations of which affect commerce within the meaning of this subsection. For purposes of this section, 'commerce' means travel, trade, traffic, commerce, transportation, or communication among the several States . . . ."

Petitioners argue first that Lake Nixon's snack bar is a covered public accommodation under §§ 201 (b)(2) and 201 (c)(2), and that as such it brings the entire establishment within the coverage of Title II under §§ 201 (b)(4) and 201 (c)(4). Clearly, the snack bar is "principally engaged in selling food for consumption on the premises." Thus, it is a covered public accommodation if "it serves or

offers to serve interstate travelers or a substantial portion of the food which it serves . . . has moved in commerce." We find that the snack bar is a covered public accommodation under either of these standards.

The Pauls advertise the Lake Nixon Club in a monthly magazine called "Little Rock Today," which is distributed to guests at Little Rock hotels, motels, and restaurants, to acquaint them with available tourist attractions in the area. Regular advertisements for Lake Nixon were also broadcast over two area radio stations. In addition, Lake Nixon has advertised in the "Little Rock Air Force Base," a monthly newspaper published at the Little Rock Air Force Base, in Jacksonville, Arkansas. This choice of advertising media leaves no doubt that the Pauls were seeking broad-based patronage from an audience which they knew to include interstate travelers. Thus, the Lake Nixon Club unquestionably offered to serve out-of-state visitors to the Little Rock area. And it would be unrealistic to assume that none of the 100,000 patrons actually served by the Club each season was an interstate traveler.[5] Since the Lake Nixon Club offered to serve and served out-of-state persons, and since the Club's snack bar was established to serve all patrons of the entire facility, we must conclude that the snack bar offered to serve and served out-of-state persons. See *Hamm* v. *Rock Hill*, 379 U. S. 306, 309 (1964); see also *Wooten* v. *Moore*, 400 F. 2d 239 (C. A. 5th Cir. 1968).

The record, although not as complete on this point as might be desired, also demonstrates that a "substantial portion of the food" served by the Lake Nixon Club snack bar has moved in interstate commerce. The snack bar serves a limited fare—hot dogs and hamburgers on buns,

[5] The District Court, which did not find it necessary to decide whether the snack bar served or offered to serve interstate travelers, conceded that "It is probably true that some out-of-State people spending time in or around Little Rock have utilized [Lake Nixon's] facilities." 263 F. Supp., at 418.